Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Petitioners,

v.

CITY AND COUNTY OF DENVER; DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; JOHN HALL, Director of the Division of Public Office Buildings,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The paramount question presented in this case is whether the Establishment Clause permits government to limit a seasonal holiday display to a particular religion to the exclusion of all other religions and belief systems relevant to the same holiday season.

A lesser question, but one of independent decisional significance, is whether the First Amendment allows a designated public forum to be regulated by unwritten rules which give government officials unfettered power to make exceptions.

STATEMENT PURSUANT TO RULE 29.6

There is no parent or publicly held company owning 10% or more of the stock of any corporation which is a Petitioner in this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit and the dissenting opinion of Briscoe, Circuit Judge, are reprinted in the Appendix ("Pet. App.") to this Petition. Pet. App. A1-A37. As of the date this Petition was sent to the printer, those opinions were not yet published. The Order denying the Petition for Rehearing *en banc* is reprinted as Pet. App. A51-A52. The Tenth Circuit's decision affirmed the ruling of the United States District Court for the District of Colorado. The latter Court's opinion is not published and is reprinted as Pet. App. A38-A45.

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion and order on July 2, 2001, and denied rehearing *en banc* on July 25, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

At issue in this case is the denial by the City and County of Denver, Colorado (the City) of the placement of a sign by petitioner Wells on the steps of City Hall during the winter holiday season. City Hall is the seat of Denver's government. It houses the offices of the Mayor, the City Council, and the State and City Courts.

Each winter holiday season, the City exhibits a display in a fenced-off area on the east steps of City Hall. The display includes a large model of the Christian nativity scene, Santa and his sleigh, elves, snowmen, an array of lights, and other objects traditionally associated with Christmas. It also includes a large billboard containing holiday greetings from a number of private firms which have contributed to the cost of the display. The display opens around Thanksgiving and closes in late January.

The east side of City Hall, including the steps, is a public forum and citizens have frequently exercised their First Amendment rights in this area.

On November 29, 1999, Wells placed a sign in the fenced-off area of the steps. The sign was promptly taken down by Denver city officials. The City's position is that Wells was not entitled to place her display on the steps because the City had preempted the steps for its exclusive use during the winter holiday season.

Wells' sign is a piece of plastic-board twenty eight inches square sitting on an easel secured by three small sandbags to give it stability. Including the three sandbags, the sign weighs between ten and fifteen pounds. When standing, the sign is approximately four and one-half feet tall. It took up

an insignificant part of the total display. See Pet. App. A53-A54.

The sign reads as follows:

At this season of
THE WINTER SOLSTICE
may reason prevail.

There are no gods,
no devils, no angels,
no heaven or hell.
There is only
our natural world.

* * * * * *

THE "CHRIST CHILD" IS A RELIGIOUS MYTH.
THE CITY OF DENVER SHOULD NOT PROMOTE RELIGION.

* * * * * *

"I believe in an America
where the separation of church and state
is absolute."
John F. Kennedy - 1960 Presidential campaign.
PRESENTED BY
THE FREEDOM FROM RELIGION FOUNDATION

Wells and the other two petitioners herein filed suit in the Federal District Court for the District of Colorado to enjoin the City from prohibiting her display. The suit was dismissed. On July 2, 2001, a three-member panel of the Tenth Circuit Court of Appeals affirmed that decision by a vote of two to one. A Petition for Rehearing *en banc* was denied on July 25, 2001.

REASONS FOR GRANTING THE WRIT

This case presents an issue of first impression which is ripe for decision by this Court. That issue is whether the Establishment Clause permits government to include a Christian scene as part of its winter holiday display but to refuse competing religions and nonreligions to have a place in the display. As creche scenes continue to multiply because of this Court's decisions in recent years, the pressure will increase for those who do not believe in Christianity to have their messages included in winter holiday displays sponsored or endorsed by government. Indeed, the issue goes far beyond winter holiday displays and encompasses such things as the placement of the Ten Commandments on public property which is in litigation in several States and has been the subject of proposed laws in both the Federal and State legislatures.

The winter holiday season is multi-cultural and multi-religious. Christians celebrate the birth of Jesus Christ during this period. Jews celebrate Chanukah. Many nonreligious people celebrate the Winter Solstice. The Winter Solstice is also a religious holiday for some groups including, for example, the Wickens.

In *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), this Court established basic rules for determining the constitutionality of winter holiday displays sponsored or endorsed by government. In applying the second prong of the so-called "*Lemon* test"[1], the Court held that such a display must "neither advance nor inhibit religion in its principal or primary effect." *Id.* at 592. This reasoning has led

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[1] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

to the routine inclusion of secular objects in displays containing a creche.

Although the Court in *Allegheny* was not confronted with the question of whether government has a duty to open a holiday display containing a creche to alternative religions, it took great pains in its *dicta* to point out that preferring one religion over another, or religion over nonreligion, would violate the Establishment Clause. The Court cited with approval a number of concurring opinions from previous decisions which held that (1) government must not "convey a message that religion or a particular religious belief is *favored or preferred*" (2) "government may not favor religious belief over disbelief", and (3) "government (may)...effect no favoritism among sects or between religion and nonreligion". *Id.* at 593 (citations omitted). The Court also reiterated its statement in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) that government "may not...promote one religion or religious theory against another or even against the militant opposite". *Id.* at 593.

The record in this case shows that, not only has the City refused to accommodate petitioners' message, but it also refused to allow another party to display a Menorah in celebration of Chanukah which, like the Winter Solstice, is a contemporaneous winter holiday. Pet. App. A37. This is the very evil against which the Supreme Court cautioned in the above-cited cases. It demonstrates unequivocally that the City not only prefers religion over nonreligion, but also favors Christianity over Judaism. In short, each year from Thanksgiving to the end January, the steps of City Hall are dedicated by the City to an expression of Christianity to the exclusion of any other religion or competing belief system. As Judge Briscoe's dissent indicates, this is a classic religious

establishment prohibited by the First Amendment. Pet. App. A35-A37.

In addition to welcoming the Winter Solstice, petitioners' sign also expressed atheistic views. This is germane to the religious aspects of the City's display. Atheism is a belief system that competes with theistic religion. The fundamental difference between the two is that proponents of theism believe in a deity whereas proponents of atheism do not.[2] This Court has held that atheistic expression is entitled to the full protection of the First Amendment including the rights to both freedom of speech and free exercise of religion. *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985). These freedoms were abridged when the City removed petitioners' sign from the east steps of City Hall.

As stated above, this is a case of first impression. It is also a case of compelling importance because it not only goes to the heart of the Establishment Clause but it also concerns the rights of citizens to engage in expressive conduct guaranteed by the free speech and free exercise clauses of the First Amendment.

There are two exacerbating factors presented in this case which should provide the Court with added impetus to issue a writ of certiorari. First, it is uncontested that the steps of City Hall are a public forum. Yet, there is no written policy governing access to the steps by citizens, nor are there any curbs or limits on the Mayor's power to grant or deny access. In her dissent Judge Briscoe concluded that "Because the

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[2] Under *Epperson v. Arkansas, supra*, atheism may properly be considered as a "religious theory" for purposes of scrutinizing the Establishment and Free Exercise Clauses.

– policy...is unwritten and subject to exceptions for which there are no standards, the policy is not a content-neutral time, place, and manner restriction, and it does not pass constitutional muster". Pet. App. A35.

The second exacerbating factor concerns a large placard included in the City's display which unmistakably conveyed holiday greetings from several private corporations. Pet. App. A31 and A33. Inexplicably, the panel majority construed the placard to be government speech. It, therefore, concluded that the City was entitled to make content-based choices and reject petitioners' message. As the dissent pointed out, because the placard clearly constituted private – not government – speech, the City's exclusion of petitioners' message was an unwarranted content-based choice in violation of the free speech clause of the First Amendment. Pet. App. A32-A34.

Even though neither of the above two factors presents a matter of first impression, each is of sufficient magnitude by itself to warrant reversal by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant this petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
July 2, 2001

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC., Plaintiffs-Appellants, vs. CITY AND COUNTY OF DENVER; DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; JOHN HALL, Director of the Division of Public Office Buildings, Defendants-Appellees.	No. 00-1040

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. No. 99-Z-2373)

Robert R. Tiernan, Denver, Colorado, for Plaintiffs-Appellants.

Stanley M. Sharoff, Assistant City Attorney (J. Wallace Wortham, Jr., City Attorney, with him on the brief), Denver, Colorado, for Defendants-Appellees.

Before **KELLY, BRISCOE**, Circuit Judges, and **MURGUIA,*** District Judge.

KELLY, Circuit Judge.

Plaintiffs Julie Wells and the National and Colorado Chapters of the Freedom From Religion Foundation ("FFRF") appeal ftom the district court's order denying their motion for preliminary injunctive relief. Pursuant to a stipulation by the parties, the court advanced and consolidated trial on the merits with the hearing on Plaintiffs' motion, and entered a final judgment in favor of Defendants. Our jurisdiction arises under 28 U.S.C. § 1291, and we affirm.

Background

Every year, the City and County of Denver ("the City") erects a holiday display on the steps leading up to the east entrance of the City and County Building ("the East Steps"). The East Steps "are the primary entrance to the City and County Building, . . . the primary access. . . into the second floor rotunda area of the building." Aplt. App. at 85. The 1999 display included a creche, tin soldiers, Christmas trees, snowmen, reindeer and other animals, an array of lights, and a shed containing Santa Claus and his elves. See Addendum, infra at ____ [Op. at 41]. The display also contained a large sign with the message "Happy Holidays from the Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building," situated to the far right of the display ("Happy Holidays sign"). Id.; Aplt. Add. at 1-3;

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* Honorable Carlos Murguia, District Judge, United States District Court of Kansas, sitting by designation.

(Pl. Ex. 1-5).[1] The Happy Holidays sign, which was built by the City's carpentry shop using public funds, listed six corporate sponsors. Aplt. App. at 86-87. The sponsors' contributions to the non-profit Keep the Lights Foundation were used to reimburse the City for part of the cost of the display. Id. at 88, 102. The display was surrounded by a fence and monitored by motion detectors and security cameras. Id. at 69-70, 88, 102-03. The fenced-off area occupied more than two-thirds of the East Steps' total square footage, leaving open a broad central corridor to allow public access to and from the building. See Addendum, infra at _____ [Op. at 41].

On November 12, 1999, the plaintiffs wrote a letter to Defendant John Hall, the Director of Public Office Buildings for the City and County of Denver, requesting permission to place a sign "inside this year's Christmas display area" and quoting the text of the proposed sign ("Winter Solstice sign") as follows:

At this season of
THE WINTER SOLSTICE
may reason prevail.
There are no gods, no devils, no angels, no heaven or hell.
There is only
our natural world.
THE "CHRIST CHILD" IS A RELIGIOUS MYTH.
THE CITY OF DENVER SHOULD NOT PROMOTE
RELIGION.

"I believe in an America
where the separation of church and state
is absolute.

John F. Kennedy - 1960 Presidential campaign.
PRESENTED BY THE FREEDOM FROM RELIGION
FOUNDATION

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[1] Plaintiffs refer to their exhibits as "Joint Exhibits" to indicate that an exhibit was part of their complaint, as well as their application for a preliminary injunction. The exhibits are not offered in cooperation with the defendants. Aplt. App. at 66. To avoid confusion, we refer to the plaintiffs' exhibits as "Pl. Ex." and the defendants' exhibits as "Def. Ex."

Aplt. Add. at 9 (Pl. Ex.11).[2] On November 28, 1999, having received no response from Denver, Ms. Wells placed the Winter Solstice sign "on the steps of the City and County Building inside the area fenced off for the City's display." Aplt. Br. at 5. Written on the back of the sign was the Eighth Commandment: "Thou shalt not steal." Aplt. App. at 58. Denver removed the sign the following morning.

Plaintiffs filed this action on December 13, 1999, seeking a preliminary injunction to compel the City "to allow the Plaintiffs to exhibit their winter solstice display on the steps of Denver's City and County Building within the fenced-off area where Defendants' Christmas holiday display is exhibited for as long as the latter display is on exhibit." Id. at 16. At the hearing on that motion, held December 23, 1999, it became clear that Plaintiffs' action included a challenge to the City's policy against unattended displays on the East Steps. Id. at 49; see also id. at 22 (Compl. at ¶¶ 9-10). At the close of the hearing, during which both parties had presented testimony and arguments, the court denied Plaintiffs' motion. Id. at 132-42 (oral ruling). Upon the parties' stipulation that the court's oral ruling "be entered as the final order and judgment," id at 39, the court advanced and consolidated the trial on the merits with the hearing for preliminary relief, entered a final judgment in favor of the defendants, and dismissed the action with prejudice. Id. at 41-42.

On appeal, Ms. Wells and the FFRF claim that the district court erred in failing to require Denver to justify (1) the exclusion of the Winter Solstice sign from the City's fenced-off holiday display, or (2) the ban on private unattended displays on the East Steps. They contend that both restrictions violate their free speech rights under the First Amendment. One of the plaintiffs' objections to Denver's unattended display ban is their claim that the policy, by virtue of being unwritten, vests unbridled discretion in city officials. Aplt. Br. at 12-14, 17.

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[2] The FFRF had written a similar letter in 1998. Aplt. Add. at 11-12 (Pl. Ex. 12). Denver responded to the 1988 letter by summarily denying "the foundation's request 'to have its holiday message included in the Christmas display' . . . ." Id. at 13 (Pl. Ex. 13).

They also claim that both restrictions are selectively enforced, and that the district court erroneously denied them the opportunity to develop a factual record on those claims. Id. at 14-19. In addition to their free speech challenges, the plaintiffs assert violations of their rights under the Free Exercise, Establishment, and Equal Protection Clauses.[3]

Discussion

I. Do the Plaintiffs' Free Speech Rights Allow Them to Compel Denver to Include the Winter Solstice Sign in the Fenced-Off Holiday Display?

The Supreme Court has articulated a three-step framework to be used when analyzing restrictions on private speech on government property. Cornelius v. NAACP Legal Def. & Educ. Fund Inc., 473 U.S. 788 (1985). First, the court must determine whether the speech at issue is protected by the First Amendment. Id. at 797. If so, the court must then "identify the nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." Id. Third, the court "must assess whether the justifications for exclusion from the relevant forum satisfy the requisite standard," e.g., whether a content-based restriction can survive strict scrutiny, whether a content-neutral restriction is a valid regulation of the time, place, or manner of speech, or

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[3] Plaintiffs do not challenge the inclusion of the creche in the display. Cf. County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984). Prior challenges to the creche have been unsuccessful. See Citizens Concerned for Separation of Church & State v. City & County of Denver, 508 F. Supp. 823 (D. Colo. 1981) (rejecting challenge under the Establishment Clause of the U.S. Constitution), aff'd, No.82-1022 (10th Cir. May 14, 1984) (unpublished order) (upholding district court's decision on basis that challenged display was indistinguishable from display upheld in Lynch v. Donnelly, 465 U.S. 668 (1984)); see also Conrad v. City & County of Denver, 724 P.2d 1309 (Colo. 1986) (rejecting challenge under the Preference Clause of the Colorado Constitution); Citizens Concerned for Separation of Church & State v. City & County of Denver, 628 F.2d 1289 (10th Cir. 1980) (holding that organizational plaintiff failed to establish standing to challenge creche).

whether a restriction in a nonpublic forum is reasonable. Id. When the government is the speaker, however, "different principles" apply. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

When the government speaks, either directly or through private intermediaries, it is constitutionally entitled to make content-based choices, " id. at 833, and to engage in "viewpoint-based funding decisions," Legal Serv. Corp. v. Velazquez, 121 S. Ct. 1043, 1048 (2001). Thus, our analysis of restrictions that arise in the context of government speech is "altogether different" than the analysis set forth in Cornelius. Bd. of Regents of Univ. of Wisc. Sys. v. Southworth, 529 U.S. 217, 235 (2000); see also id. ("The Court has not held, or suggested, that when the government speaks the rules we have discussed [regarding public fora and viewpoint neutrality] come into play."); Latino Officers Ass'n. New York. Inc. v. City of New York, 196 F.3d 458, 468 (2d Cir. 1999) (noting in dicta that "the government may regulate its own expression in ways that would be unconstitutional were a private party the speaker"), cert. denied, 528 U.S. 1159 (2000). Although the Supreme Court has applied these principles in only one case, Rust v. Sullivan, 500 U.S. 173, 192-93 (1991) (sustaining a prohibition on abortion-related advice by recipients of federal funds designated for family-planning counseling), the Court has discussed the government speech doctrine at some length in three recent cases. Velazquez, 121 S. Ct. at 1048; Southworth, 529 U.S. at 235; Rosenberger, 515 U.S. at 833. Thus, we believe that the doctrine is a viable one, and that it is appropriate to employ it in the case before us. Cf. Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1011(9th Cir. 2000), cert. denied, 121 S. Ct. 1653 (2001); Knights of the Ku Klux Klan v. Curators of the Univ. of Mo., 203 F.3d 1085, 1093-94 (8th Cir.) [hereinafter Knights of the KKK], cert. denied, 121 S. Ct. 49 (2000); Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1044 (5th Cir. 1982) (en banc) (predating Rust).

Under the government speech doctrine, the exclusion of the Winter Solstice sign from the fenced-off display raises two questions. First, given that the display constitutes speech, who is the speaker? Second, if the speaker is the City of Denver, to what extent may it control the contents of the display?

A. Whose Speech Is It?

Denver owns each component part of the display. Aplt. App. at 89. The City maintains and replaces those parts when necessary, it erects the fence that surrounds the display, and it provides video cameras, motion detectors, and a security guard to protect the display. Id. at 69-70, 88-89, 102-03. In Denver's view, the display is the City's message to the community. Id. at 95-96, 101-04. On the other hand, Ms. Wells and the FFRF contend that the display is merely an assortment of private speech by corporations that have paid for the privilege. E.g., id. at 95. Plaintiffs' characterization of the display is not supported by the record.

Plaintiffs' argument revolves around the large Happy Holidays sign, which stands inside the fence at the far right of the display. See Addendum, infra at _____ [Op. at 41].[4] According to the City, the Happy Holidays sign is a "Thank You" from Denver to the sponsors, Aplee. Br. at 20 n.10, and the district court agreed. Aplt. App. at 140-41. In the plaintiffs' view, however, the plain language of the sign demonstrates that it is a message from -- not to -- the sponsors, and they assert that they are equally entitled to communicate their message from within the fence. Aplt. Br. at 18-19. We conclude that the sign is Denver's speech, not that of the listed corporations.

The Supreme Court has provided very little guidance as to what constitutes government speech. As noted, we are aware of only one case, Rust v. Sullivan, 500 U.S. 173 (1991), in which the Court actually applied the principles that underlie the

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[4] As shown in the Addendum, the text of the sign is as follows: on the left, "HAPPY HOLIDAYS FROM THE Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building," and on the right, "NEWS4 Spirit of Colorado", "Coors Light", and "King Soopers • AAA of Colorado • Denver Rocky Mountain News • Rock Bottom Brewery". "HAPPY HOLIDAYS", "NEWS4", and "Coors Light" are written in the largest font, and are therefore the most prominent. The font used for the phrases "FROM THE Keep the Lights Foundation" and "Spirit of Colorado," and to list the other four corporate sponsors is about half that size. The phrase "and the sponsors..." is even smaller, about one-quarter the size of the largest font.

government speech doctrine. In that case, the Court "upheld the government's prohibition on abortion-related advice applicable to recipients of federal funds [under Title X] for family planning counseling." Rosenberger, 515 U.S. at 833 (citing Rust, 500 U.S. at 194). We recognize that "Rust did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to governmental speech; when interpreting the holding in later cases, however, [the Supreme Court has] explained Rust on this understanding." Velazquez, 121 S. Ct. at 1048. The other Supreme Court cases that have discussed the doctrine have done so only in dicta. Id.; Southworth, 529 U.S. at 235; Rosenberger, 515 U.S. at 833. In each case, the Court held that the speech at issue did not constitute government speech. Velazquez, 121 S. Ct. at 1049 ("The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept."); Southworth, 529 U.S. at 235 ("In the instant case, the speech is not that of the University or its agents. It is not, furthermore, speech by an instructor or a professor in the academic context, where principles applicable to government speech would have to be considered."); Rosenberger, 515 U.S. at 841 ("The University has taken pains to disassociate itself from the private speech involved in this case.").[5] A few of our sister circuits, however, have had occasion to apply the government speech doctrine, and their opinions are instructive. Downs, 228 F.3d at 1013-16; Knights of the KKK, 203 F.3d at 1093-94; see also Muir, 688 F.2d at 1044.

The Eighth Circuit's opinion in Knights of the KKK is particularly on point. That case arose when the Ku Klux Klan of Missouri wrote to the University of Missouri's public radio station, KWMU, offering to underwrite four segments of National Public Radio's "All Things Considered." 208 F.3d at 1089. Under federal law, public radio stations must

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[5] The Court has consistently "emphasized the importance of context in determining the extent to which the government can control speech." Snyder v. Murray City Corp., 159 F.3d 1227, 1243 (10th Cir. 1998) (Briscoe, J., dissenting) (citing Rosenberger, 515 U.S. at 833-34); accord Velazquez, 121 S. Ct. at 1049- 52; Southworth, 529 U.S. at 234-35.

acknowledge the underwriters (sponsors) of particular broadcasts by identifying them, on the air, during the broadcast. Id. at 1088 (citing 47 U.S.C. § 317(a)(1)). To encourage contributions, KWMU operated an "enhanced underwriting" program, pursuant to which acknowledgments could include a limited amount of additional information about the underwriter. Id. at 1088-89 & n.3 (citations omitted). The Klan included the following proposed announcement with its offer of funds:

> The Knights of the Ku Klux Klan, a White Christian organization, standing up for rights and values of White Christian America since 1865. For more information[,] please contact the Knights of the Ku Klux Klan, at [mailing address]. Let your voice be heard!

Id. at 1089 (first alteration in original). When the station declined the Klan's offer, the organization sued, alleging violations of the First Amendment and the Equal Protection Clause. The Eighth Circuit rejected both challenges, holding, inter alia, that the underwriting acknowledgments constituted government speech. Id. at 1093.

To support that conclusion, the Eighth Circuit relied on a number of factors: (1) that "the central purpose of the enhanced underwriting program is not to promote the views of the donors;" (2) that the station exercised editorial control over the content of acknowledgment scripts; (3) that the literal speaker was a KWMU employee, not a Klan representative; and (4) that ultimate responsibility for the contents of the broadcast rested with KWMU, not with the Klan. Id. at 1093-94. The Ninth Circuit relied on similar factors in Downs, in which the court rejected a public school teacher's claim that he had a First Amendment right to respond to his school's recognition of Gay and Lesbian Awareness month by posting anti-homosexuality materials on a school bulletin board. See Downs, 228 F.3d at 1011-12 (holding that content of bulletin boards was government speech in that boards were used to express school policy, that access was limited to faculty and staff, that "postings were subject to the oversight of the school principals," that the school district had made no "affirmative effort to disclaim responsibility

for the [boards'] content," and that the boards were "the property and responsibility" of the school and the district). Due to the "special characteristics of the school environment," Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 506 (1969)), we rely primarily on the four factors articulated in Knights of the KKK.[6]

As to the purpose of the sign, the record evidence includes the City's complete control over the sign's construction, message, and placement, as well as Mr. Hall's testimony that "[t]he sign is there to thank the sponsors and the citizens for the support of the cost of the display. . . . It is there to recognize their financial support and presentation of the display." Aplt. App. at 96; see also id. at 102-03. The district court found Mr. Hall's testimony to be credible, id. at 140, and we cannot say that finding was clearly erroneous. The fact that the sponsors may receive an incidental benefit from the Happy Holidays sign -- in the form of publicity and good will -- does not refute Mr. Hall's testimony as to the sign's purpose. Indeed, any benefit that accrues to the sponsors ultimately serves the City's interests by providing current and putative sponsors with an incentive to contribute to the Keep the Lights Foundation in the future. In this sense, the sign is comparable to the enhanced underwriter acknowledgments in Knights of the KKK. See 203 F.3d at 1088, 1093-94 & nn.10-11.

Second, it is uncontroverted that the City built, paid for, and erected the sign. Aplt. App. at 86-87; see also Knights of the KKK, 203 F.3d at 1094 n.9 (recognizing that the announcements at issue served primarily to identify sponsors, but noting that "conveyance of this collateral information remains a communicative act of the government"). Significantly, there is no indication that any of the corporate' sponsors even knew about the Happy Holidays sign, much less exercised any editorial

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[6] Although Downs did involve speech in a secondary school, the Ninth Circuit indicated that its holding was neither controlled by nor limited to the school setting in which the case arose. E.g., 228 F.3d at 1011 ("This case is not controlled by [the leading Supreme Court and Ninth Circuit school cases] because it is a case of the government itself speaking . . . .").

control over its design or content. Ms. Wells and the FFRF could have obtained discovery on this issue by serving interrogatories on Denver, see Fed. R. Civ. P.33, or by deposing representatives of the listed corporations. See Fed. R. Civ. P. 30(a)(1) (allowing deposition of non-party); Fed. R. Civ. P.45 (allowing party to subpoena witness to appear at deposition). Rather than pursue these options, however, Plaintiffs stipulated to the entry of a final judgment. Aplt. App. at 38-40. According to that stipulation, "[n]either the Plaintiffs nor the Defendants has any additional witnesses, evidence, or argument to present to the Court at this time and, therefore, agree that this action may, pursuant to Rule 65(a)(2) F.R.C.P., be advanced and consolidated on the merits based upon the evidence received at the hearing on the Motion for Preliminary Injunction." Id. at 39, ¶ 4 (emphasis added).

As to the final Knights of the KKK factor, this litigation is itself an indication that the City bears the ultimate responsibility for the content of the display. Even more persuasive is the fact that the City has assumed full responsibility for providing security for the display, including a fence to guard against theft and protect citizens from possible electrical hazards, Aplt. App. at 88, video cameras, id. at 102-03, motion detectors, id. and a security guard. Id. at 69-70, 103. Accordingly, we conclude that the holiday display, including the Happy Holidays sign, is government speech.

The dissent relies on a footnote in Knights of the KKK for the proposition that "[a]n additional factor relevant to the inquiry is who the listener believes to be the speaker." Infra at ____ [Dissent at 3] (citing Knights of the KKK, 203 F.3d at 1094 n.9). Even assuming, arguendo, that "listeners' perception" is one relevant factor, our consideration of that factor would be limited to the perception of an informed and objectively reasonable observer. Cf. e.g. Good News Club v. Milford Cent. Sch., No.99-2036,--- U.S.---, ---, 2001 WL 636202, at *11 (U.S. June 11, 2001) (rejecting subjective, speculative listeners' perception argument as "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive") (emphasis added); Capitol Square Review & Advisory Bd. v.

Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring in part and concurring in judgment) ("[T]he reasonable observer. . . must be deemed aware of the history and context of the community and forum in which the religious display appears. . . . Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.") (emphasis added); Bauchman ex rel. Bauchman v. West High School, 132 F.3d 542, 555 (10th Cir. 1997) (attributing to reasonable observer knowledge of "the purpose, context and history of public education in Salt Lake City, including the historical tension between the government and the Mormon Church"). In this case, an informed, objectively reasonable observer would know the significance of the display's location on the City and County Building Steps; would know that Denver has erected this or a similar holiday display since at least 1979, see Citizens Concerned for the Separation of Church & State, 508 F. Supp. at 825; would view the size, content, and location of the Happy Holidays sign in the context of the display as a whole;[7] and would consider the fact that the sign's largely generic lettering is a far cry from the sophisticated graphic design generally associated with commercial speech. Weighed against this knowledge, we cannot agree with the dissent's conclusion that the mere fact that the sign did not contain the words "Thank You" would lead a reasonable observer to conclude that the display was corporate speech. Having determined that the display constituted government speech, we turn now to the constitutional implications of that conclusion.

B. Given that the Holiday Display Constitutes Government Speech. To What Extent Can Denver Control the Contents of the Display?

"[W]hen the State is the speaker, it may make content-based choices." Rosenberger, 515 U.S. at 833. For example, the First Amendment does not bar the government from "mak[ing] a value judgment favoring childbirth over abortion," Rust, 500

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[7] As shown by the Addendum to this opinion, the dissent's assertion that the Happy Holidays sign "appears to dominate one side of the display," infra at ____ [Dissent at 2] (emphasis added), is inaccurate. See Addendum, infra at ____ [Op. at 41].

U.S. at 192-92 (internal quotations and citations omitted) or from implementing that judgment by "refusing to fund activities, including speech," which relate to abortion. Id. at 194-95. Similarly, "[a]n arm of local government... may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance if it so decides, and restrict the contrary speech of one of its representatives" by refusing to incorporate that speech into its own presentation. Downs, 228 F.3d at 1014; see also Knights of the KKK, 203 F.3d at 1094-95 (holding that government-owned radio station may control the contents of its own speech, but declining to decide whether governmental speech that is not editorial in nature is per se exempt from forum analysis).

Upon consideration, we conclude that the City of Denver is entitled to present a holiday message to its citizens without incurring a constitutional obligation to incorporate the message of any private party with something to say. "Simply because the government opens its mouth to speak does not give every outside individual or group a First Amendment right to play ventriloquist." Downs, 228 F.3d at 1013. Although we recognize that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker," Velazquez, 121 S. Ct. at 1048, there is nothing in this record that supports the plaintiffs' assertion that the Winter Solstice sign was excluded from the display for viewpoint-based reasons. In fact, Mr. Hall testified that he had also denied an anonymous caller's request for permission to add a menorah to the 1999 display. Aplt. App. at 95, 104. We see no inconsistency between that denial and Mr. Hall's reluctance to rule out the possibility that he might consider an elected official's proposal that the City include a menorah in future displays; Id. at 108-09. Nor do we agree that the district court abused its discretion by sustaining the City's objection to a line of inquiry that called for speculation as to the possible content of future displays. Id. at 109.

In sum, we hold that the City acted within its rights to control the contents of its own speech. See. e.g., Muir, 688 F.2d at 1044 ("[T]he First Amendment does not preclude the government from exercising editorial control over its own medium of expression.").

II. Does Denver's Private Unattended Display Ban Either on its Face or As Applied, Violate the Plaintiffs' First Amendment Rights to Freedom of Speech?

Plaintiffs' Winter Solstice sign was removed not only because it was "an intrusion into the display [the City] had erected," but also because "[it was an unattended display on the front [i.e., East] steps of the City and County Building." Aplt. App. at 92. Although Denver permits demonstrations, rallies, picketing, leafleting, and similar speech activities on the City and County Building's interior sidewalks and – absent a conflict with another event – on the East Steps, the City does not permit private unattended displays on the steps. Id. at 89-92. Thus, whether speech is permissible or impermissible depends solely on its "manner," namely: whether or not the speaker is present. Id. at 91. As explained, we assess the regulation of private speech on government property according to a three-step analytical framework. Cornelius, 473 U.S. at 797; accord Mesa v. White, 197 F.3d 1041, 1044 (10th Cir. 1999); Summum v. Callaghan, 130 F.3d 906, 913 (10th Cir. 1997). Because the defendants have conceded that the Winter Solstice sign constitutes protected speech, Aplee. Br. at 12, our analysis begins with the second step: whether the property to which the plaintiffs seek access is a traditional public forum, a designated public forum, or a non-public forum. See Cornelius, 473 U.S. at 797; accord Summum, 130 F.3d at 913. This characterization of the relevant forum is necessary to determine "the extent to which [Denver] may limit access to this property -- i.e., whether a heightened or reasonableness standard applies...." Summum, 130 F.3d at 913 (citing Cornelius, 473 U.S. at 797). Third, "we must assess whether [Denver's] justifications . . . satisfy the requisite standard," id., in this case, whether the unattended display ban is narrowly tailored to further significant government interests, while leaving open ample alternative channels for communication. See Ward v. Rock Against Racism, 491 U.S. 781, 791(1989).

A. Public Forum Analysis

"[T]he Court [has] identified three types of fora: the traditional public forum, the public forum created by government

designation, and the nonpublic forum." Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998) (quoting Cornelius, 473 U.S at 802) (alteration in original); accord Hawkins v. City & County of Denver, 170 F.3d 1281, 1286 (10th Cir.), cert. denied, 528 U.S. 871 (1999). In addition, certain government properties are "not fora at all." Forbes, 523 U.S. at 677 (citation omitted). Traditional public fora, such as public parks and sidewalks, are places that "by long tradition or by government fiat have been devoted to assembly and debate...." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). Within a traditional public fora, the appropriate First Amendment standard depends on whether a restriction on speech is content-based or content-neutral. Content-based restrictions must survive strict scrutiny – i.e., they must be narrowly tailored to further a compelling governmental interest. Id.; see also United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 813 (2000) (noting that under strict scrutiny, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative"). "On the other hand, we will uphold content-neutral time, place, and manner restrictions on speech provided they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Hawkins, 170 F.3d at 1286 (quoting Perry, 460 U.S. at 45) (emphasis added).

The second category of government property consists of designated public fora. "The designated public forum, whether of a limited or unlimited character, is one a state creates 'by intentionally opening a non-traditional forum for public discourse.'" Hawkins, 170 F.3d at 1286 (quoting Cornelius, 473 U.S. at 802); see also Forbes, 523 U.S. at 677 ("Designated public fora. . . are created by purposeful governmental action."). Designated public fora differ from traditional public fora in that "a State is not required to indefinitely retain the open character of the facility. . . ." Hawkins, 170 F.3d at 1287 (quoting Perry, 460 U.S. at 46); accord Summum, 130 F.3d at 914; see also DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ., 196 F.3d 958, 970 (9th Cir. 1999) ("The government has an inherent right to control its property, which includes the right to close a previously open forum.") (citations omitted), cert. denied, 529 U.S. 1067 (2000). While a designated public forum remains

open for public discourse, however, the government is subject to the same standards that apply in a traditional public forum. Perry, 460 U.S. at 46.

"Other government properties are either nonpublic fora or not fora at all." Forbes, 523 U.S. at 677 (citing Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678-79 (1992)). "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." Cornelius, 473 U.S. at 806 (citing Perry, 460 U.S. at 49). A reasonable restriction "need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808.

1. Definition of Forum

Before we may properly characterize the forum at issue, we must first identify its boundaries. See id. at 801 ("[F]orum analysis is not completed merely by identifying the government property at issue"). To define the relevant forum, the Supreme Court has

> focused on the access sought by the speaker. When speakers seek general access to public property, the forum encompasses that property. In cases in which limited access is sought, [the Court's] cases have taken a more tailored approach to ascertaining the perimeters of a forum within the confines of the government property.

Id. (citation omitted). For example, the Cornelius Court defined the relevant forum as the federal fund-raising drive to which the plaintiffs sought access, rather than the federal workplace in general. Id.; see also Lebron v. Nat'l R.R. Passenger Corp. (Amtrak), 69 F.3d 650, 655-56 (2d Cir.) (defining forum as particular advertising space to which plaintiff sought access, rather than alternative space also owned by defendant), amended by 89 F.3d 39 (2d Cir. 1995); Texas v. Knights of the Ku Klux Klan, 58 F.3d 1075, 1078 (5th Cir. 1995) (defining forum as

Adopt-a-Highway Program rather than public highways generally, where KKK sought permission to participate in Program near recently desegregated housing project). We recognize that Ms. Wells and the FFRF initially sought access only to the fenced-off area, Aplt. Add. at 9-12 (Pl. Ex. 11-12), and that they actually installed the Winter Solstice sign inside the fence. Id. at 2 (Pl. Ex. 4). Nonetheless, the record shows that for the purpose of Plaintiffs' "as applied" challenge to the unattended display ban, the relevant forum encompasses the entire East Steps, whether fenced-off or not. See Aplt. App. at 49 ("[W]e don't even want [the Winter Solstice sign] included in [Denver's] display. All we want to do is to have the right to post our sign unattended on the steps . . .") (statement by Plaintiffs' counsel at hearing) (emphasis added).[8]

2. Characterization of Forum

The parties disagree as to whether the relevant forum is a traditional or a designated public forum. See Aplt. Br. at 10 & n. 3 (traditional); Aplee. Br. at 12-14 (designated). We find it unnecessary to resolve this dispute. As explained, the only distinction between the two types of public fora is that the government "is not required to indefinitely retain the open character" of a designated public forum. Perry, 460 U.S. at 46; accord Hawkins, 170 F.3d at 1287; Summum, 130 F.3d at 914. Since neither the plaintiffs nor the defendants claim that the unattended display ban has effectively closed the forum, the distinction between traditional and designated public fora has no practical significance in this case. E.g., Aplt. App. at 114 ("[T]he only difference between [a designated] and a traditional public forum . . . is that [a designated forum] can be canceled as a public forum if the City so chooses, but it hasn't so chosen, so it's a public forum.") (statement by Plaintiffs' counsel at hearing). As long as a public forum remains open, the government is subject to the same constitutional standards

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[8] With respect to Plaintiffs' facial challenge to the unattended display ban, of course, our consideration is not limited to the East Steps, but includes all areas covered by the policy, i.e. the steps and interior sidewalks. See infra at _____ [Op. at 33-35].

regardless of whether the forum is designated or traditional; the critical inquiry is content-neutrality.

3. Content-Neutrality

In this case, the district court concluded that Denver did in fact have a policy prohibiting unattended displays, and that the policy was content-neutral. Aplt. App. at 139-40. We agree. The trial court based its finding on the testimony of Mr. Hall, and on the absence of any evidence to the contrary. Id. at 139-42. Despite the district court's exclusive reliance on testimonial evidence, "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" Rankin v. McPherson, 483 U.S. 378, 38.6 n.9 (1987) (quoting Bose Corp. v. Consumers Union of United States, Inc., 466 U.S. 485, 499 (1984) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 284-86 (1964))); see also Aplt. App. at 49 ("[This case probably can be decided without evidence . . . because it really is an issue of law. I don't think there is much factual dispute.") (comment by court). Thus, our review is de novo. Snyder v. Murray City Corp., 159 F.3d 1227, 1230 n.7 (10th Cir. 1998) (en banc).

Upon a careful review of the entire record, we agree that Denver does indeed have a policy that prohibits unattended displays on the East Steps, and we hold that this policy is content-neutral both on its face and as applied. As to the existence of the policy, Plaintiffs have presented no evidence to counter Mr. Hall's testimony, given under oath, that Denver's unattended display ban has been in effect since at least 1985. Aplt. App. at 92, 97. Unlike the dissent, we cannot construe the City's failure to cite the unattended display ban in response to Plaintiffs' letters as evidence that no such policy existed. The record shows that both the 1998 letter and the 1999 letter specifically requested permission to place the Winter Solstice sign inside the fenced-off display. Aplt. Add. at 9 (Pl. Ex. 11) (1999 letter) (noticing intent "to place the [] sign inside this year's Christmas display area") (emphasis added); id. at 11 (Pl. Ex. 12) (1998 letter) (noticing intent to have the sign "included

in the Christmas display") (emphasis added). But cf. Aplt. Br. at 4 (stating that letters noticed Plaintiffs' "intention to place a display on the steps of the City and County Building"). We have already held that the City was not required to incorporate Plaintiffs' message into its holiday display; Accordingly, we cannot accept Plaintiffs' argument that the City's failure to cite the unattended display ban constitutes evidence that the ban was fabricated for the purpose of this litigation. Aplt. Br. at 12.[9] The same reasoning applies to the anonymous caller's request to add a menorah to the display – i.e., inside the fence. Aplt. App. at 104. The City's failure to volunteer information – either to Plaintiffs or to the anonymous caller – about an irrelevant policy is probative of nothing.

B. Time-Place-Manner Restrictions

A content-neutral restriction in a traditional or designated public forum is subject to review as a regulation on the time, place, and manner of speech. In a time-place-manner analysis, the government must show that the regulation is "narrowly tailored to serve a significant governmental interest, and that [it] leave[s]) open ample alternative channels for communication of the information." Ward, 491 U.S. at 791 (internal quotations and citations omitted); see also Perry, 460 U.S. at 45. Applying this test, we conclude that Denver's unattended display ban is constitutional.

1. Significant Governmental Interests

The analysis applicable to time-place-manner restrictions is more lenient than strict scrutiny. First, the interests supporting a content-neutral time-place-manner regulation need not be compelling, only significant or substantial. See Ward, 491 U.S.

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[9] The policy was not clearly implicated until the hearing on December 23, 1999, when Plaintiffs' counsel clarified: "we don't even want [the sign] included in [Denver's] display. All we want to do is to have the right to post our sign unattended on the steps of city hall." Aplt. App. at 49. But cf. id. at 13 (requesting, in Complaint, that the court order "Defendants to permit the Plaintiffs to display their sign unattended in the fenced-off area on the steps of Denver's City and County Building") (emphasis added).

at 796; cf Playboy, 529 U.S. at 813 (noting that content-based regulation must "promote a compelling Government interest"). The City has asserted two interests supporting the unattended display ban: (1) keeping the steps free of physical obstructions in order to enable access to the building, particularly in the event that an emergency evacuation is necessary, and (2) avoiding the burden of eventually disposing of displays left unattended. See Aplee. Br. at 14-15.

The Supreme Court has upheld a wide range of government interests as sufficiently significant or substantial to justify a time-place-manner restriction. E.g., Ward, 491 U.S. at 796 ("substantial interest in protecting. . citizens from unwelcome noise") (quotations and citations omitted); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 296 (1984) ("substantial interest in maintaining the parks. . . in an attractive and intact condition"). In 1997, the Court held that the government's asserted interests in ensuring public safety and order, promoting the free flow of traffic on streets' and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services, in combination, were significant. Schenck v. Pro-Choice Network, 519 U.S. 357, 376 (1997). The City's interest in avoiding the burden of disposing of unattended displays is not supported by the record, but because the City's interest in facilitating building access implicates public safety, e.g., Aplt. App. at 91-92, that interest is significant and substantial. In light of our holding that the plaintiffs have no right to add their sign to the City's display, their argument that a sign "placed well inside the fenced-off area" would not constitute an obstruction is irrelevant. See Aplt. Br. at 10-11; Aplt. App. at 71, 101.

2. Narrowly Tailored

Second, unlike a restriction subject to strict scrutiny, a time-place-manner regulation need not be the least restrictive means available in order to qualify as "narrowly tailored." Ward, 491 U.S. at 798. In a time-place-manner case, "the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," and does not

"burden substantially more speech than is necessary to further the government's legitimate interests." Ward, 491 U.S. at 799 (quotations and citations omitted, alteration in original). The permissive nature of the time-place-manner "narrowly tailored" requirement was most recently illustrated in Hill v. Colorado, 530 U.S. 703 (2000). In that case, the Court upheld a Colorado statute that created a floating "no-approach" zone around anyone within one hundred feet of the entrance to any health care facility. While acknowledging that the statute would sometimes operate to limit harmless speech, the Court concluded that "[a] bright-line prophylactic rule may be the best way to provide protection ...." Hill, 530 U.S. at 729. In light of this precedent, we must conclude that the unattended display ban is narrowly tailored. In the absence of the ban, Denver's asserted interests would certainly be "achieved less effectively," and there is no evidence that the ban restricts "substantially more speech than is necessary." Ward, 491 U.S. at 799; see also infra at _____ [Op. at 30-31] (discussing alternative channels of communication).

3. Alternative Channels of Communication

The defendants presented undisputed testimony that the ban leaves speakers with ample alternatives for communicating their message:

> Q: [I]f I can summarize, you're saying that leafleting, demonstrations, picketing, and all other kinds of First Amendment activities where the speaker is present is available anywhere on the steps or in the interior sidewalk or the pedestrian sidewalk by the City and County Building?
>
> A. That's correct.

Aplt. App. at 91 (direct examination of Mr. Hall); see also id. at 89-91. The plaintiffs' concern that "because of the controversial nature of the sign, confrontations would inevitably result thus jeopardizing [the sign holder's] physical safety" is irrelevant to their First Amendment rights. Aplt. Br. at 7; see also id. at 11

(noting Ms. Wells' concern that "if she is required to attend the sign, her personal safety would be put in danger from malcontents who might feel offended"). The First Amendment does prohibit the suppression of unpopular speech because of its content, but it does not require the government to serve as a speaker's proxy or bodyguard in order to enhance the strength of the speaker's message in the marketplace of ideas. See Regan v. Taxation With Representation of Wash., 461 U.S. 540, 549-50 (1983) ("[A]lthough government may not place obstacles in the path of a person's exercise of freedom of speech, it need not remove those not of its own creation.") (internal quotations, citation, and alterations omitted).

That said, we cannot ignore the fact that assault and menacing are illegal under Colorado law. See Colo. Rev. Stat. § 18-3-204 ("A person commits the crime of assault in the third degree if he knowingly or recklessly causes bodily injury to another person. . . ."); Colo. Rev. Stat. § 18-3-206 ("A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury."); see also 18 U.S.C. § 241 (prohibiting conspiracies to interfere with exercise of a federal right, including the right to free speech). Our evaluation of whether the unattended display ban leaves Ms. Wells and the FFRF with sufficient alternative channels of communication must presume that people who view the sign will obey the law. In sum, we hold that Denver's ban on unattended private displays is a content-neutral regulation of the time, place, or manner – in this case, manner – of speech, and that it is therefore consistent with the First Amendment.

C. Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995)

The plaintiffs are very critical of the district court's oral reference to Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995). See Aplt. Br. at 9. In Pinette, the Court held that the State does not violate the Establishment Clause when, pursuant to a content-neutral policy, it permits a private party to display an unattended cross in a traditional public forum. 515 U.S. at 770. The Court noted that a State could "impose

reasonable, content-neutral time, place, and manner restrictions" in public fora, and noted in dicta that "a ban on all unattended displays, which did not exist [in Pinette], might be one such" restriction. Id. at 761. In this case, Ms. Wells and the FFRF claim that "the Court indulged in a strained and incorrect reading" of that dicta. Aplt. Br. at 9. Specifically, they allege that the court "erroneously construed Pinette" as overruling, by dicta, the Supreme Court's prior decisions in Ward and Perry. Aplt. Br. at 9. In addition, the plaintiffs object to the court's failure to explicitly conduct the time-place-manner analysis set out in Ward. Aplt. Br. at 8, 15. These arguments are unpersuasive.

First, it is well-established that "we are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusions of law, even grounds not relied upon by the district court." United States v. Sandia, 188 F.3d 1215, 1217 (10th Cir. 1999) (quotations and citation omitted). Upon de novo review, we conclude that the unattended display ban is a valid time-place-manner restriction, and the district court's discussion of the various opinions in Pinette hardly displaces our analysis. In any case, we find no error in the court's reference to Pinette. The relevant language in Justice Scalia's majority opinion – joined, in pertinent part, by six other justices – hypothesized that an unattended display ban "might be" an example of a valid time-place-manner restriction. Pinette, 515 U.S. at 761.[10] The district court in this case consistently referred to the relevant language as dicta. E.g., Aplt. App. at 116 ("Capitol Square indicates there can be a ban on all unattended displays. It did not occur in that case, so, it's dicta... ."); see also

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[10] The language in Justice Souter's concurring and Justice Stevens' dissenting opinions is more definitive, but that language did not carry a majority of the Court. Id. at 783-84 (Souter, J., concurring ~~in~~ part and concurring in the judgment) ("The fact that the capitol lawn has been the site of public protests and gatherings, and is the location of any number of the government's own unattended displays . . does not disable the State from closing the square to all privately owned unattended structures.") (emphasis added); id. at 803 (Stevens, J., dissenting) (noting that "a State may impose a ban on all private unattended displays in [] a [public] forum") (emphasis added).

id. at 137-138. Taking the Pinette Court's suggestion as a starting point, the court then concluded that the policy before it was, in fact, a valid time-place-manner restriction. In our view, the court did conduct a time-place-manner analysis, despite its failure to say whatever magic words the plaintiffs were looking for.

D. Facial Challenge to the Unattended Display Ban: Unbridled Discretion

Plaintiffs also challenge the unattended display ban on its face, claiming that the prohibition is a per se violation of the First Amendment in that it vests unbridled discretion in city officials. "[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 757 (1988) (citations omitted); see also e.g., Police Dep't of Chicago v. Mosley, 408 U.S. 92, 97 (1972); Shuttlesworth v. City of Birmingham, 394 U.S. 147, 150-53 (1969); Poulos v. New Hampshire, 345 U.S. 395,407 (1953). As a preliminary matter, we note that the fact that Denver's policy is unwritten is not fatal, but merely a factor to be considered. Lebron, 69 F.3d at 658 ("The fact that a policy is not committed to writing does not of itself constitute a First Amendment violation.").

In addition, the record indicates that the unattended display ban leaves very little room for official discretion – if any. E.g., Aplt. App. at 97, 107 (testifying that there are no exceptions to the unattended display ban) (Mr. Hall). To counter this evidence, Ms. Wells and the FFRF note that in the wake of the Columbine High School shooting in April 1999, the mayor allowed "signs, cards, stuffed animals, and other paraphe[r]nalia [that] were taped to the sidewalk and the fence below the steps" by mourners to remain unattended for ten to fourteen days. Aplt. Br. at 15; see also Aplt. App. at 73. There is no other evidence that the City has permitted private, unattended displays at the City and County Building, and there is no evidence that the City has ever permitted such displays on the East Steps. Aplt. App. at 77, 93-94, 97, 107.

Even if we assume that the Columbine displays constitute evidence that the policy allows official discretion, we find that discretion is sufficiently bounded to survive constitutional scrutiny. The unbridled discretion doctrine requires that official discretion affecting First Amendment interests be bounded by limits that are "made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice." City of Lakewood, 486 U.S. at 770 (citations omitted, emphasis added). In this case, Denver's "well-established practice" with respect to the unattended display ban appears to be one of uniform enforcement, with the sole exception of the Columbine displays. As discussed below, the events surrounding the Columbine displays were extraordinarily tragic and highly emotional. Neither City of Lakewood nor any other unbridled discretion case supports the proposition that a single, unique exception to a generally applicable and otherwise uniformly enforced policy is sufficient to render that policy constitutionally void. Accordingly, we must reject the plaintiffs' claim that the City's discretion is unfettered.

E. As Applied Challenge to the Unattended Display Ban: Selective Enforcement

As to the application of the policy, Plaintiffs have presented no probative evidence to counter Mr. Hall's testimony that the policy is and always has been enforced in a uniform, non-discriminatory manner, without regard to content or viewpoint. Aplt. App. at 92-93, 97, 107. We have given careful consideration to the Columbine displays, see Aplt. App. at 73, 77, 92-93, 97; Aplt. Add. at 5-8 (Pl. Ex. 7-10), taking judicial notice of the facts surrounding those displays, see Fed. R. Evid. 201(b), (c), and we conclude that the plaintiffs' selective enforcement claim is not supported by the record. On April 20, 1999, two masked gunmen opened fire on their fellow students at Columbine High School in Littleton, Colorado. The shooters murdered thirteen high school students, then killed themselves. An additional twenty-three students were hospitalized, twenty-one with gunshot wounds. On April 21-22, 1999, the City of Denver sponsored a memorial event in Civic Center Park, which is across the street from the City and County Building at issue in this appeal. Aplt. App. at 93. Simultaneous with that event,

grieving citizens left various items in the nature of teddy bears, flowers, and notes on the interior sidewalks surrounding the East Steps in order to express solidarity with the victims and their families. Aplt. Add. at 5-8 (Pl. Ex. 7-10).

Despite the unattended display ban, which applies to the interior sidewalks as well as the East Steps, Mayor Webb elected to postpone removing those items for ten to fourteen days. Aplt. App. at 73, 97. According to Mr. Hall, the mayor's decision was based on "the particularly tragic nature of that event, the heinous nature of the crime, and simply the outpouring of sympathy" from Denver's community. Id. at 93. Like the district court, we believe that the Columbine shooting was so unique and so extraordinarily horrific that the mayor's decision not to remove the mourners' teddy bears and flowers is simply not probative as to the general operation of the unattended display ban. See id. at 140 ("I can't really give weight to [the Columbine displays] as some evidence that there is no policy, because that was a totally unique situation. That was a situation which never arose before and probably hopefully never will arise again.") (statement by court). On direct examination, even Ms. Wells expressed doubts as to whether the Columbine display was properly described as "an exception to their policy [concerning] unattended displays. . . ." Id. at 73.

We must also reject Plaintiffs' contention that the district court erroneously denied them the opportunity to develop a complete factual record on the issue of selective enforcement. Aplt. Br. at 14. At the hearing on Plaintiffs' motion for preliminary injunctive relief, the City objected to the following question, posed to Mr. Hall: "You think the Columbine situation is more important than Ms. Wells' sign?" Aplt. App. at 98. The court sustained the objection on the grounds that the question was not only argumentative, but also irrelevant in that it asked the "witness his personal views about which is more important." Id. at 99. We see no abuse of discretion in the court's ruling.

III. Free Exercise. Establishment Clause and Equal Protection Challenges

Plaintiffs' remaining constitutional arguments are somewhat elusive. The underlying premise for all three challenges is that the Winter Solstice sign is "religious in the sense that atheism is a belief system that competes with theistic religions...." Aplt. Br. at 20. Plaintiffs cite no legal authority for this proposition, but as we did in Otero v. State Election Bd. of Okla., 975 F.2d 738, 740 (10th Cir. 1992), we will assume, without deciding, that atheism is a religion for First Amendment purposes. Next, the plaintiffs claim that:

> By keeping [the Winter Solstice] sign off the steps of City [sic] and by imposing. . . restrictions on it that do not apply to the creche [presumably, the unattended display ban], the City is preferring Christianity over non-religion and theism over atheism. This abridges Wells' right. . . to free exercise of her religious beliefs under the First Amendment and is a denial of equal protection under the Fourteenth Amendment. It is also an unconstitutional establishment of religion under the First Amendment because it violates the second prong [of] the Lemon test. . . .

Aplt. Br. at 20-21 (footnote omitted); cf. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (articulating three-part test for Establishment Clause challenges: first, the governmental action at issue "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster an excessive government entanglement with religion") (internal quotations and citations omitted). Beyond Lemon, Plaintiffs cite no legal authority for these assertions.

Because the challenged policies are both generally applicable and neutral as to religion, the free exercise claims must fail. See Shaffer v. Saffle, 148 F.3d 1180, 1181-82 (10th Cir. 1998) (holding that religion-neutral law that is generally

applicable does not violate Free Exercise Clause, despite incidental effect on religious practice); accord Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 878-79 (1990). The plaintiffs' claims under the Establishment Clause are also unavailing. As to the exclusion of the Winter Solstice sign from the City's display, we find the reasoning employed by Citizens Concerned for Separation of Church & State v. City & County of Denver, 508 F. Supp. 823 (D. Colo. 1981), aff'd, No. 82-1022 (10th Cir. May 14, 1984) (unpublished order), to be persuasive. See supra note 3. The fact that the present plaintiffs seek to add to the City's display, rather than to dismantle it, makes no difference to the Establishment Clause analysis. Cf. Snyder, 159 F.3d at 1233 (rejecting Establishment Clause claim by individual seeking "equal public access to a legislative body's program of invocational prayers). With respect to the unattended display ban, Plaintiffs fail on each prong of the Lemon test.[11] As explained in our discussion of the significant governmental interests supporting the policy, see supra at _____ [Op. at 27-29], the unattended display ban has a secular purpose. Cf. Lemon, 403 U.S. at 612. There is no evidence that the policy's "principal or primary effect" either "advances [or] inhibits religion," id (citation omitted), nor does it "foster an excessive government entanglement with religion." Id. at 613 (internal quotations and citation omitted).

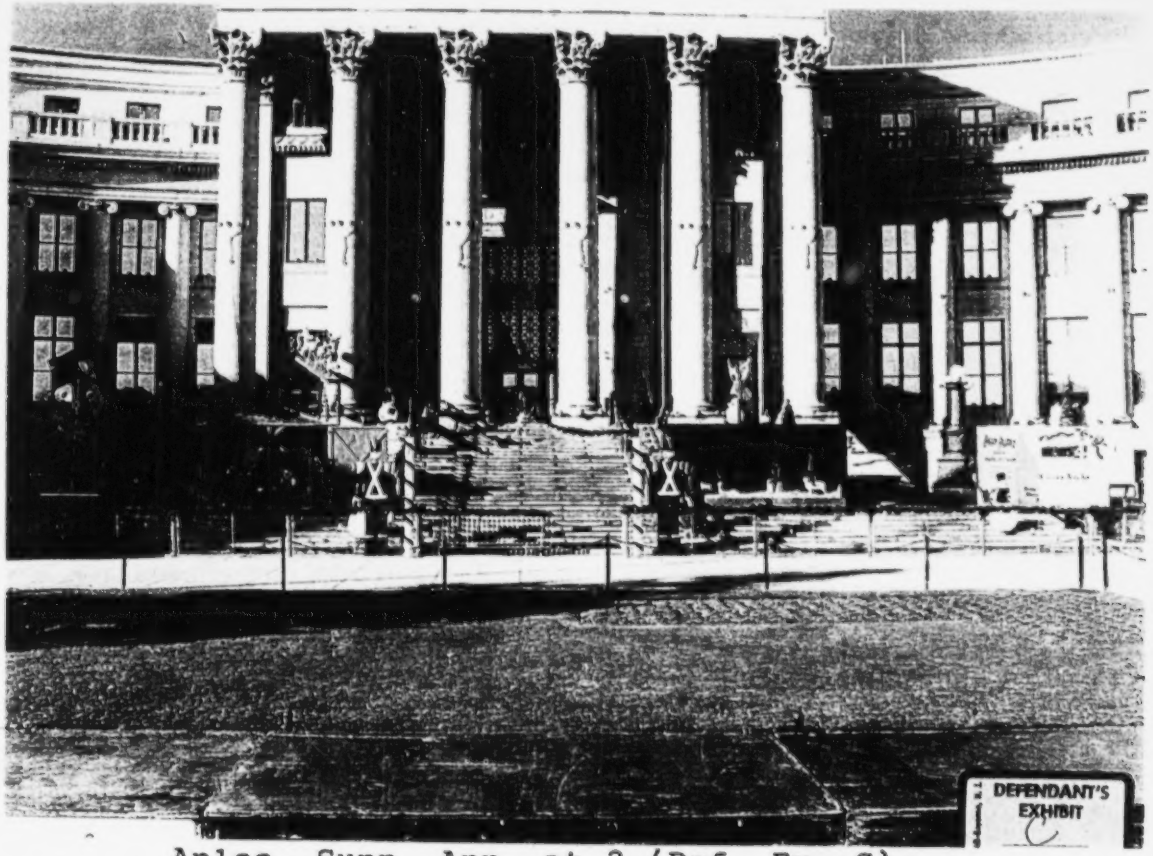
Plaintiffs' equal protection claims are also without merit. Contrary to Plaintiffs' characterization, the display, including the Happy Holidays sign, is the City's speech. As explained, the plaintiffs have no First Amendment rights to dictate the content of that speech. Thus, there is no evidence that the plaintiffs have been "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in

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[11] The dissent concedes "that a content-neutral policy banning all unattended displays would pass the Lemon test," but concludes that no such policy exists in this case. Infra at _____ [Dissent at 6]. Given our conclusion that Denver does have a content-neutral unattended display ban, we need not address the dissent's analysis under Lemon, nor is it necessary to respond to the dissent's rhetoric regarding the implications of Mr. Hall's brief conversation with an anonymous caller. See infra at _____ [Dissent at 7-8].

treatment." Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (citations omitted). Without such evidence, the equal protection claim must fail. Nor is there any evidence that similarly situated persons were subject to differential treatment with respect to the unattended display ban. As noted in our discussion of the plaintiffs' selective enforcement claim, the Columbine mourners were not similarly situated. See supra at _____ [Op. at 35-37].

For the foregoing reasons, the district court's judgment is AFFIRMED.



Aplee. Supp. App. at 2 (Def. Ex. C).



Aplt. Add. at 2 (Pl. Ex. 3).

No. 00-1040, Wells v. City & County of Denver

BRISCOE, Circuit Judge, dissenting:

I respectfully dissent from the majority opinion. First, I disagree with the conclusion that the display on the Denver steps is solely government speech. Second, I disagree with the conclusion that Denver has a neutral policy of banning all unattended displays from the steps. Third, I disagree with the majority's analysis of the Establishment Clause issue.

Standard of Review

In a First Amendment case, this court performs an independent examination of the record to ensure protection of free speech rights. Hawkins v. City & County of Denver, 170 F.3d 1281, 1285 (10th Cir.), cert. denied, 528 U.S. 871 (1999). "In cases involving the First Amendment, the de novo standard is appropriate. . . . [A]n appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." Horstkoetter v. Dep't of Pub. Safety, 159 F.3d 1265, 1270 (10th Cir. 1998) (internal quotations omitted).

Government Speech

The majority concludes that the display on the steps is government speech rather than private speech. This conclusion is significant because "when the State is the speaker, it may make content-based choices." Rosenberger v. Rector & Visitors of Univ. of Va.., 515 U.S. 819, 833 (1995). I agree with Wells that the holiday display is not solely government speech, but contains private speech, because it includes a billboard which states:

HAPPY HOLIDAYS FROM THE Keep the Lights Foundation and the sponsors that help maintain the lights at the City and County Building	News 4 Spirit of Colorado Coors Light King Soopers • AAA of Colorado Denver Rocky Mountain News Rock Bottom Brewery

Maj. Op. Add. This large billboard is the only sign evident from the photos of the display included in the record and it appears to dominate one side of the display. See id.

The majority states that the billboard with the list of sponsors is a thank you from the city to the sponsors, making it government speech. However, the language of the billboard is not phrased as a thank you from Denver to the sponsors. Rather, it is a greeting from the sponsors to the public. To a passerby, the billboard does not appear to be from Denver, but from the sponsors, all of whom are private entities. The billboard shows that those private corporations have co-sponsored the holiday display, also making the display their speech as well as Denver's speech.

In determining this is government speech, the majority relies on the four-factor "test" in Knights of Ku Klux Klan v. Curators of University of Missouri, 203 F.3d 1085 (8th Cir. 2000). However, it is not clear whether the court in Knights of KKK was creating a test to be applied in all government speech cases, or whether it was identifying the factors that evidenced government speech in that case. See id. at 1093-94. An additional factor relevant to the inquiry is who the listener believes to be the speaker. See id. at 1094 n.9 (differentiating the underwriting announcements from letters to the editor because the letters "are more obviously the speech of the writer, not the government").

In Knights of KKK, it was clear that the government was speaking. See id. at 1093-94. Similarly, in Downs v. Los Angeles Unified School District, 228 F.3d 1003, 1009-11(9th

Cir. 2000), it was clear to the reader that the bulletin board constituted government speech, as presented by a state-employed teacher. In the present case, it is not clear *to the reader/listener* that the government, rather than the sponsors, is the speaker. All of the factors identified by the majority (purpose of the sign, who paid for and built the sign, legal responsibility of the display) address who is actually responsible for the message on the sign. While I agree that Denver owns and controls the sign, there is no way for the casual reader/listener to know this. To a passerby, the sign and the message are from a group of private organizations, and the holiday display is at least in part their speech. I dissent from the majority holding that the display is government speech.

Neutral Policy

The majority also concludes that Denver has a content-neutral policy of banning all unattended displays from the steps. Because the steps are either a traditional or a designated forum, such a policy would be a constitutional time, place, and manner restriction. See Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 761, 783-84 (Souter, J. concurring), 803 (Stevens, J. dissenting) (1995). However, I disagree with the conclusion that Denver has such a policy.

John Hall testified that private unattended displays are not permitted on the steps or the interior sidewalk and that this unwritten policy had been in place since at least 1985. However, on the two occasions that Wells requested information about the need for a permit related to her sign, she was not told of such a policy. An anonymous caller inquiring about adding a menorah to the holiday display was not told about this policy. Following the Columbine tragedy, a display of cards, flowers, and stuffed animals remained on the interior sidewalk in front of the steps of the building for over ten days. Further, the annual Christmas display is itself an exception to the policy, as it is replete with unattended displays and signs.

The majority states that the fact that the policy was not identified to Wells or the anonymous caller does not mean it

does not exist, and that the Columbine display was a one-time exception. However, Denver's failure to enforce the policy consistently should come under very close scrutiny. See Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) ("To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination."). If Denver is permitted to make exceptions to its policy that private unattended displays are not permitted on the steps or interior sidewalk, or if Denver is permitted to make these exceptions without any established standards, it has the sort of unbridled discretion that permits viewpoint discrimination and violates the First Amendment. See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 84 (1981) (Stevens, J., concurring) ("[M]unicipalities may regulate expressive activity – even protected activity – pursuant to narrowly drawn content-neutral standards; however, they may not regulate protected activity when the only standard provided is the unbridled discretion of a municipal official."). The majority reasons that the discretion is not unbridled because it has been exercised only for the Columbine tragedy. However, there is no indication that the policy was enforced prior to Wells' request, only that the policy existed. Further, the fact that Denver has not exercised its discretion to permit an exception to its policy on numerous occasions does not make the exercise of its discretion any less unbridled. There are no clear restrictions on the City's discretion or established standards which would in any way restrict the City when granting an exception to its policy banning unattended displays.

Because the policy of disallowing unattended displays from the steps is unwritten and subject to exceptions for which there are no standards, the policy is not a content-neutral time, place, and manner restriction, and it does not pass constitutional muster.

Establishment Clause

The majority concludes there is no Establishment Clause violation because we previously have found the Denver display to be constitutional and because the unattended display

ban passes the test created in Lemon v. Kurtzman, 403 U.S. 602 (1971). I disagree.

The case of Citizens Concerned for Separation of Church & State v. City & County of Denver, 508 F. Supp. 823 (D. Colo. 1981), aff'd, No.82-1022 (10th Cir. May 14, 1984) (unpublished order), is not persuasive or controlling authority for the resolution of the Establishment Clause issue presented. Citizens dealt with the question of whether the display's inclusion of a creche was unconstitutional. It did not, address the question of whether including a creche while excluding other religious messages was constitutional. This court has not addressed the question of exclusion of religious messages from holiday displays.

I agree with the majority that a content-neutral policy banning all unattended displays would pass the Lemon test. However, because such a policy does not exist here, I would apply the Lemon test to the decision to exclude Wells' sign, rather than any alleged policy to ban all unattended displays. Under the Lemon test, the statute or action must have a secular purpose, the primary or principal effect must neither advance nor inhibit religion, and it must not foster excessive government entanglement with religion. Lemon, 403 U.S. at 612-13.

Under Lemon, the first question is whether the decision to prohibit Wells' sign has a secular purpose. Denver argues that its purpose in prohibiting the sign is to keep the steps from being blocked. However, this justification is meaningless since Wells proposed putting the sign within the fenced-off display which Denver already had located on the steps. Denver has not identified any other secular reason for its decision.

Under Lemon, the second question is whether the principal or primary effect is one that neither advances nor inhibits religion. In Conrad v. City & County of Denver, 724 P.2d 1309, 1316 (Colo. 1986), the court held that the holiday display's primary effect was not to advance or inhibit religion. However, the court noted that the presence of a nativity scene may have the remote and incidental effect of advancing religion.

Hall testified that when an anonymous caller asked if she could put a menorah in the holiday display, Hall told her that she could not. Thus, Denver has taken the position that, as regards religious items, only items pertaining to the holiday of Christmas are welcome in its display. Wells' sign, like the menorah, represents an alternative religious perspective that Denver has opted to exclude from its display. The decision to exclude Wells' sign and a menorah from the display sends the message that Denver supports Christianity and does not support other religions or religious viewpoints. When the City creates that impression, it violates the Establishment Clause. Because the decision to allow only Christian symbols in the display and to prohibit other religious perspectives has the primary effect of promoting or inhibiting religion, Denver's decision fails the second prong of the Lemon test.

Under Lemon, the third question is whether the decision fosters excessive government entanglement with religion. To determine this question, we are required to inquire as to whether there is excessive administrative entanglement and whether the government action causes continuing political strife over aid to religion. Conrad, 724 P.2d at 1316. The answer to both of these questions is no. The only administrative responsibilities involved are to deny the requests of all persons who wish to have their non-Christian religion represented in the display. This is not complicated and has not taken much administrative time. The only political strife that exists is caused by litigation such as the present case. A plaintiff cannot create strife by litigating and, then arguing that the policy causes strife. Therefore, Denver's decision passes the third prong of the Lemon test.

Because the decision to exclude Wells' sign violates the first two prongs of the Lemon test, I dissent from the opinion's holding that there is no basis for concluding there is an Establishment Clause violation established in the present case.

I would reverse the district court's dismissal of Wells' claims and remand for further proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk
December 23,1999

Civil Action No. 99-S-2373

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO; THE DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; and JOHN HALL, Director of the Division of Public Office Buildings,

Defendants.

RULING

THE COURT: Well, it's really unfortunate, I think, in this case that the City does not have a written policy. And it's unfortunate that the letter of defendant, Exhibit 11, was not courteously answered. If it had been and the policy had been attached or explained, we might not have all the expense of this lawsuit.

But that, perhaps, is putting the cart before the horse. Let me review a little bit of the law for the benefit of -- I'm sure the attorneys know it, but we have a few other people present.

Creches have been the subject of court decisions for a

number of years and going all the way back at least 15 years to the case of *Lynch vs. Donnelly.* That was a case where the county courthouse -- let me double-check, because I don't want to mix this up with *Allegheny,* which was county. This may have been state. Pawtuket display was a City of Pawtuket display in a city-owned park or a park owned by nonprofits which was comprised of many figures, decorations: Santa Claus, reindeer, Christmas trees and a creche. And the question is whether in the city's sponsoring the display -- whether the city was advancing religion and violating the establishment clause of the First Amendment of the Constitution.

And that Supreme Court decision, which was about 15 years ago, 1985, said no, because if they indicated -- they went back and did some historical discussion, and then they said, "It would be ironic if the inclusion of a single symbol of a particular historic religious event as part of a celebration acknowledged in the western world for 20 centuries and in this country by the people, by the executive branch, by Congress and the courts for two centuries would so "taint" – "quotes around the word 'taint'" – the City's exhibit as to render it violative of the establishment clause. For to forbid the use of this one passive symbol, the creche, at the very time that people are taking notice of Christmas," etc., "would be a stilted overreaction." *Lynch vs. Donnelly* is 465 U.S. 668, 1985 -- sorry -- 1984.

And that was a case which says the city can display a creche if it's surrounded by all these other figures, including the figures we've seen in the exhibits in this case: Santa Claus, reindeer, Christmas trees, clowns, toys, and so forth.

And basically, it would appear to the Court that the City and County of Denver's display is indeed based on the *Lynch* decision and based on the type of display in the *Lynch* case to assure that the city's display is not in violation of the establishment clause. And indeed, the Colorado Supreme Court in the case of *Conrad vs. City and County of Denver*, in 1986, shortly after *Lynch*, found that it was not in violation of the establishment clause -- and *Conrad* is 724 P.2d 1309 and

basically held that the Denver nativity scene did not violate the Colorado constitution.

So what we have is both federal and state court decisions which say that -- say that the type of display, the Christmas display with the creche and the toys and the reindeer and the Santa Claus all the other stuff, is not a violation of the establishment clause, as much as it might offend many people such as the plaintiff.

Now, after *Lynch* came a case called *Allegheny*; and *Allegheny*, which was not very long after Lynch -- 1989, I believe -- 1989 Supreme Court -- was the case which set the test for when a state or city was endorsing a religious symbol such as a creche. In the *Allegheny* case, which is 492 U.S. 573, a beautiful creche was donated to the city by a religious order and was displayed on, if I can quote from the decision, "the main, the most beautiful, the most public part of the courthouse, which was the grand stairway." There were no Santa Clauses or reindeer or toys or other types of things, as there were in the *Lynch* case, but rather there was simply this beautiful stairway with the nativity scene on it. And the court said no, because the message communicated what viewers may fairly understand to be the purpose of display, which turns on the context, is that the city is endorsing the religious feeling of the creche in that case.

The test for public endorsement of a religious symbol was basically set forth some years ago in the *Lynch* and the *Allegheny* cases and then further embellished and explained more recently in the case that we've talked about a little bit, which is *Capitol Square Review vs. Pinette*, which is 1995. Parts of it are majority opinion and parts are a plurality opinion, which mean that on one critical issue of what does it take to be a endorsement in violation of the establishment clause, there is no majority opinion.

But in addition to really in a very long, very complex decision going into some of these issues that were first raised in earlier cases, the Supreme Court discussed what happens when a private group wants to put religious symbols on public

property. In this case, it was the KKK, Ku Klux Klan, which wanted to put a cross on the state's – in an area right in front of a state building. And the Capitol Square area was one which – in which the state invited citizens to make displays.

On page 758 of the decision, the court says, "It has been the board's policy to allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square. Such diverse groups as homosexual rights organizations, KKK, the United Way have held rallies.

"The board – "and this is what I think is important – "the board has also permitted a variety of unattended displays on Capitol Square: a state sponsored lighted tree during the Christmas season, a privately sponsored menorah during Hannukah," and so forth. I wouldn't be – I would be surprised if there wasn't some display by plaintiff organization.

But the question was whether the state had to permit the cross by the KKK or whether that would be a violation of the establishment clause. And the one issue that the court was considering was the establishment clause.

In the course of this long and involved decision which talked about previous decisions and also talked about the test of when there was endorsement by the state, there was some very interesting language which applies to this case. This – the – in the plurality decision -- sorry. In the majority part of the decision. Is isn't the plurality. There were four parts, and the part I'm looking at is part 2, which was majority. Seven justices. The court said the following: "The state has the right to limit protected expressive activity. This right is sharply circumscribed. It may impose reasonable content neutral time, place, and manner restrictions."

And then it goes on to say that a ban on all unattended displays, which did not exist here, might be one such.

So it's *dictum,* and they're saying there could be a ban on all unattended displays; but it's a strong piece of *dictum*

because it's the majority with seven justices agreeing.

Later, Judge Souter has a concurring decision which primarily criticizes Justice Scalia's endorsement test; but also in the course of trying to say we want the -- we feel it should be the same endorsement test as in *Allegheny* -- in other words, what reasonable people would perceive -- he says the following, and this is on page 784. Let me just paraphrase part of this. Let's see.

The fact that the capital lawn has been the site of public protests, etc., does not disable the state from closing the square to all privately owned, unattended structures. A government entity may ban posters, for example, may ban camping in certain public parks. And then it says, quote, "It may similarly adopt a content neutral policy prohibiting private individuals and groups from erecting unattended displays in forums around public buildings."

Three justices agreed, some of whom were the original seven who agreed with Justice Scalia on his point.

So we've got basically -- I think all of them were – we've got basically seven justices saying that the state, city can ban all unattended displays.

And then we do have the dissenting opinion of Judge Stevens, which raises this point again, this nice piece of *dictum.* He starts out by saying, "This court has never held that a private party has a right to place an unattended object in a public forum. Today the Court correctly recognizes that the state may impose a ban on all private, unattended displays in such a forum."

So there is Justice No. 8, who is saying there may be such a total ban that is raised as the defense in this case.

In this case, of course, as in all parts of our government, private parties have the right to free speech under the First Amendment, to make displays under the First Amendment; but

the question is whether they can do so in an area right in front of a public building such as the City and County Building if there is a ban on such displays, a ban which is content neutral regardless of the message. It could say, "Have a good day and still be banned." And the answer pretty clearly is such a sign as we have here today or even a sign with a happy face cannot be displayed if, indeed, there is an absolute prohibition or an absolute ban.

And there appear to be eight justices of the current Supreme Court which state that proposition.

That, then, leaves the issue of whether there is such a ban in Denver against any sign regardless of what the message is being shown on the steps to the City and County Building.

I wish that the evidence would indicate a written policy for outside as well as inside. It would be very easy to do. And I hope that Mr. Sharoff will take the message back to the Mayor and others that the policy should be put in writing so that everybody can know about it.

I wish that Mr. Sharoff or Mr. Hall or someone had answered the letter that was written to them concerning whether there could be a display and perhaps just stating the policy of the City as they understood it that there cannot be any public displays whatsoever.

What the Court has, what I have before me, is the testimony under oath of Mr. Hall that since 1985, this policy has been in effect, although not in writing; that there is a total, absolute ban regardless of message, regardless of content, of anything on the steps of the City and County Building, in the fenced area.

Now, there has been some testimony that after the tragedy at Columbine, there were flowers, toys, and other items placed in the area in front of the steps. And actually, one of the exhibits shows the pictures.

I can't really give weight to that as some evidence that there is no policy, because that was a totally unique situation. That was a situation which never arose before and probably hopefully never will arise again. So I don't think that can be any proof of whether there is or is not this policy.

The testimony is that there is such a policy; and indeed, there is no showing before the Court of any signs being posted by anyone or any -- any indication, any evidence that there is not such a policy. So the fact of the policy is shown not only by the testimony of Mr. Hall but also by the lack of any evidence of displays that are in this area where the City has its display.

I can understand why plaintiffs are upset by the sign, which indicates -- and I think that's what it says -- a thank you to those that are sponsoring the lights. And what the sign says, for the record, is, "Happy holidays from the Keep the Lights Foundation" and the sponsors that help maintain the lights at the City and County Building. The testimony by Mr. Hall has been that this sign is the City's sign thanking those that contribute to the display of lights, and the names of those people that are the sponsors are listed. They are News 4, Coors Light, King Soopers, Triple A of Colorado, Rocky Mountain News, Rock Bottom Brewery. Interesting assortment of -- of entities.

But I think that sign is what it purports to be, is a sign thanking those that are contributing money to keep the display going. And it may be that if they were not contributing money, the city would have problems putting up the money to keep the Christmas display and taking it out of the taxpayers' pockets; so it is perhaps better that the money comes from commercial enterprises than from the taxpayers.

I don't think that sign in itself affects the rule of law that the City has the right under the current state of affairs with the Supreme Court to make an absolute prohibition, an absolute ban.

So my ruling at this time is that although the plaintiffs'

argument is very sympathetic, nevertheless the City has had testimony about this absolute policy. There has been no evidence to the contrary; that there isn't this absolute policy or no substantial evidence in any case, and the Court is satisfied that this falls within the area described in the case of *Capitol Square*, where the state or the governmental group may have its own speech as long as it does not violate the establishment clause, which this does not, and may prohibit private speech altogether regardless of content, as stated by eight justices of the Supreme Court.

My only suggestion to the plaintiff group is that they may want to put their sign up at strategic places, public places, for short periods of time when they can man and attend their sign, if not by one person who might be concerned about safety but maybe a couple good, strong big men who can stand by it and protect her, because she has the right to put that sign up and to be in attendance. And there is certainly a lot of other places besides the front of the City and County Building to put it up, maybe in front of state house or wherever.

The Court at this time will find that the standard indeed is heavily and compellingly, and the plaintiff has failed to convince this court heavily and compellingly that it has a likelihood of prevailing on the merits and as to the other considerations under *Lundgrin vs. Claytor* for a preliminary injunction. I don't think I need to comment, although I should say, that as far as irreparable injury, the -- since the plaintiff would have the right to put the sign up in any number of places, I'm not sure that I'm convinced that there is irreparable injury here or any violation of First Amendment rights.

The Court will deny the motion for a preliminary injunction. I hope that some good has been done by this case, because I hope that it will encourage the City to put together a written policy and also encourage the City to – someone in the City to answer letters that are written to it concerning its policy or concerning its display.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk
January 5, 2000

Civil Action No. 99-S-2373

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO; THE DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; and JOHN HALL, Director of the Division of Public Office Buildings,

Defendants.

ORDER AND JUDGMENT OF DISMISSAL

FURTHER ORDERED that pursuant to Fed. R. Civ. P. 65(a)(2), the trial of this action on the merits shall be advanced and consolidated with the previously held hearing on Plaintiffs' Motion for Preliminary Injunction. It is

FURTHER ORDERED that judgment is entered in favor of defendants and against plaintiffs. It is

FURTHER ORDERED that the Verified Complaint and cause of action are dismissed with prejudice. It is

FURTHER ORDERED that the parties shall bear their own costs.

DATED at Denver, Colorado, this 5th day of January, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk
December 16, 1999

Civil Action No. 99-S-2373

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs,

v.

THE CITY AND COUNTY OF DENVER, COLORADO; THE DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; and JOHN HALL, Director of the Division of Public Office Buildings,

Defendants.

MINUTE ORDER

ORDER ENTERED BY JUDGE ZITA L. WEINSHIENK

Joan E. Boline, Judicial Assistant

Dated: December 16, 1999

It is ORDERED that Plaintiffs' Motion For Preliminary Injunction is set for hearing on Thursday, December 23,1999, at 10:00 a.m. in Courtroom C-400, United States Courthouse, 1929 Stout Street, Denver, Colorado. It is

FURTHER ORDERED that plaintiffs shall have 90

minutes to complete the presentation of their case. Thus, with the inclusion of a fifteen minute morning break, plaintiffs must be finished by 11:45 a.m. Defendants will start at 11:45 a.m. and shall have 90 minutes and, with a one hour lunch break, must be finished by 2:15 p.m. It is

FURTHER ORDERED that defendants shall file a brief in opposition, not to exceed ten pages double-spaced, plus affidavits and relevant documents, to Plaintiffs' Motion For Preliminary Injunction by December 21, 1999.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; and THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiffs-Appellants,

v.

THE CITY AND COUNTY OF DENVER, COLORADO; THE DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; and JOHN HALL, Director of the Division of Public Office Buildings,

Defendants-Appellees.

Case No. 00 -1040

GRANTED
AS REQUESTED

MAR 15 2000

PATRICK FISHER

MOTION TO FILE OVERSIZED EXHIBIT

COME NOW the Appellants, by and through their undersigned attorney, and respectfully move that they be granted leave to file an oversized exhibit pursuant to Fed.R.App.P. Rule 27 and 10th Cir. R. 27. IN SUPPORT OF THIS MOTION, it is stated as follows:

1. This case involves a controversy over whether Appellants' sign should be allowed to stand unattended on the steps of Denver City Hall during the Christmas holiday season. The sign is approximately twenty eight inches square, sits on a wooden tripod four and one half feet tall, and weighs less that five pounds. It was admitted in evidence before the District Court as Plaintiffs' Exhibit No.14.

2. Appellants believe it would be useful for this Court to have the actual sign available as an oversized exhibit. This would enable the Court to see the sign in its full size, not merely as a xerox copy on a piece of paper. It would allow the Court to more accurately compare the size of the sign in relation to the total space available on the steps of City Hall. It would also allow the Court to verify that the sign weighs very little and would be easy to remove once the holiday season concludes.

3. Counsel for the Appellees has advised the undersigned that he has no objection to the granting of this Motion.

Respectfully submitted,

Robert R. Tiernan
Attorney for the Plaintiffs-Appellants
3120 S. Xenia Street
Denver, CO 80231
(303) 671-2490

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
July 25, 2001

JULIE N. WELLS; FREEDOM FROM RELIGION FOUNDATION, INC.; THE COLORADO CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff- Appellant,

v.

CITY AND COUNTY OF DENVER; DEPARTMENT OF GENERAL SERVICES OF THE CITY AND COUNTY OF DENVER; WELLINGTON WEBB, Mayor of the City and County of Denver; THOMAS J. MIGAKI, Manager of the Department of General Services, City and County of Denver; JOHN HALL, Director of the Division of Public Office Buildings,

Defendants - Appellees.

No. 00-1040

ORDER

Filed July 25, 2001

Before **KELLY** and **BRISCOE**, Circuit Judges, and **MURGUIA***, District Judge.

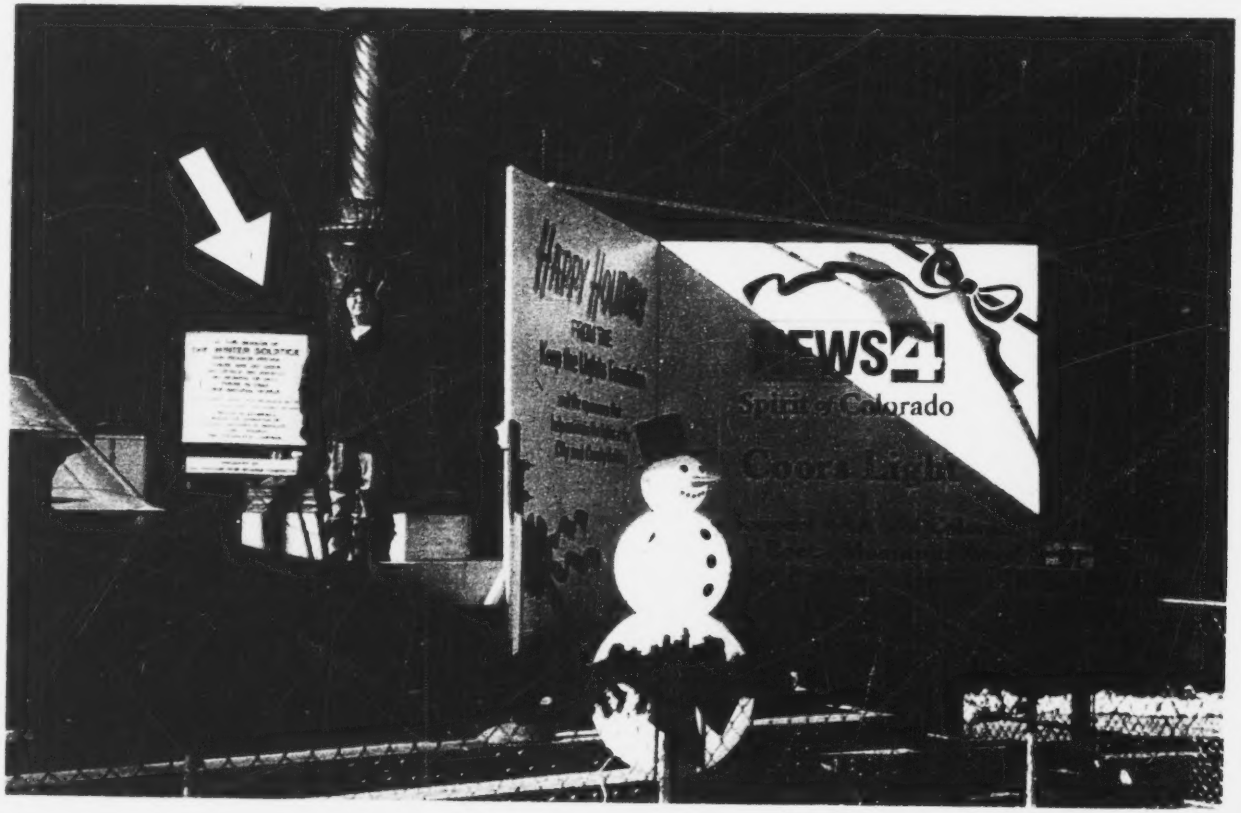
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*Honorable Carlos Murguia, District Judge, United States District Court for the District of Kansas, sitting by designation.

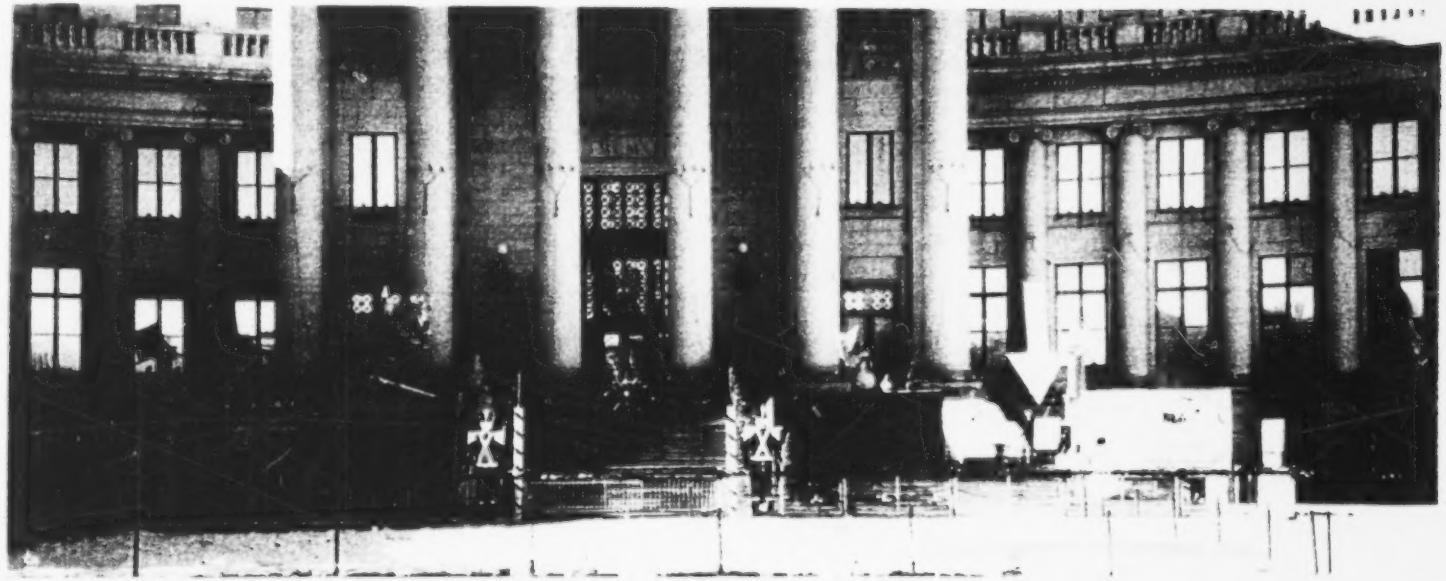
This matter comes before the court on appellants' motion for leave to file petition for rehearing en banc out of time. Said motion is denied.

Appellant's lodged petition for rehearing en banc is denied as untimely.

Entered for the Court
PATRICK FISHER, Clerk of Court



JOINT EXHIBIT 4



JOINT EXHIBIT 5